

AMENDED IN SENATE JUNE 16, 2016

AMENDED IN ASSEMBLY MAY 31, 2016

AMENDED IN ASSEMBLY MARCH 15, 2016

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL

No. 2880

Introduced by Committee on Judiciary (Assembly Members Mark Stone (Chair), Alejo, Chau, Chiu, Cristina Garcia, Holden, and Ting)

February 25, 2016

An act to amend ~~Sections 13988, 13988.2, 13988.3, and Section 14615.1 of, and to add Sections Section 6253.11 and 13988.35 to, the Government Code, and to amend Section 10335 of the Public Contract Code, relating to state intellectual property.~~

LEGISLATIVE COUNSEL'S DIGEST

AB 2880, as amended, Committee on Judiciary. State intellectual property.

(1) The California Public Records Act requires a state or local agency, as defined, to make public records available for inspection, subject to certain exceptions.

~~This bill would provide that any work released into the public domain would be a public record. The bill would also prohibit a public agency from denying a request for public records under the California Public Records Act on the grounds that the information requested is protected under the federal Copyright Act of 1976, except as specified. require a public agency to comply with a request to inspect or copy a public record that is protected by the federal Copyright Revision Act of 1976 unless the record is otherwise exempt from disclosure.~~

~~(2) Existing law authorizes the Department of General Services to carry out various powers and duties relating to assisting a state agency in the management and development of intellectual property developed by state employees or with state funding, including, among other duties, developing a database of state-owned intellectual property using specified data and factors that state agencies should consider when deciding whether to sell their intellectual property or license it to others.~~

~~This bill would authorize a state entity to own, license, and, if it deems it appropriate, formally register intellectual property it creates or otherwise acquires. The bill would provide that a state entity's intellectual property rights would not preclude the state entity from disclosing any information otherwise accessible under the California Public Records Act.~~

~~(3)~~

~~(2) Under existing law, contracts by state agencies for services rendered to the state are, with certain exceptions, of no effect unless and until approved by the Department of General Services. Existing law imposes various requirements with respect to contracts for services rendered to the state. Existing law requires the department to develop factors for state agencies to consider in deciding whether to sell or license their intellectual property.~~

~~This bill would require the department to develop factors for state agencies to consider~~

~~The bill would require a state entity that reasonably determines that a work meets the criteria for copyright protection to catalogue the work and submit the information to the department. For~~

~~*This bill would, for contracts entered into on or after January 1, 2017, the bill would prohibit require a state agency from entering into a contract that fails to address the state's for services to consider the intellectual property rights of both the state and the contracting party unless the agency, prior to execution of the contract, obtains the consent of the department. The bill would also require the department to develop sample language for an advisory provision stating, among other things, that an attempted waiver of intellectual property rights without the approval of the department is void. The bill would provide criteria to be considered by a state entity in pursuing an action for copyright infringement.*~~

~~(4)~~

~~(3) Existing law exempts from the Administrative Procedure Act certain actions to maintain, develop, or prescribe processes, procedures,~~

or policies by the Department of General Services that are required or authorized by the Legislature with respect to the general operations of the department or the awarding of state contracts.

This bill would additionally exempt those actions taken with respect to the department's above-described duties relating to the management and development of state intellectual property, as provided.

~~(5) Existing constitutional provisions require that a statute that limits the right of access to the meetings of public bodies or the writings of public officials and agencies be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.~~

~~This bill would make legislative findings to that effect.~~

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 6253.11 is added to the Government
2 Code, to read:
3 6253.11.— (a) Any work released into the public domain shall
4 be deemed a public record.
5 (b) A public agency shall not deny a request for a record that is
6 otherwise public pursuant to this chapter on grounds that the
7 information requested is protected by the federal Copyright Act
8 of 1976 (17 U.S.C. Sec. 101 et seq.). A request for such a record
9 shall be denied only if one of the following applies:
10 (1) The facts of the particular case demonstrate that the public
11 interest served by not disclosing the record clearly outweighs the
12 public interest served by disclosure of the record as provided in
13 subdivision (a) of Section 6255.
14 (2) The record in question is exempt under express provisions
15 of this chapter.
16 (c) A public agency that releases a public record that is subject
17 to copyright protection pursuant to paragraph (1) of subdivision
18 (b) of Section 13988.3 shall issue the requesting party a license to
19 use the record in a manner that is consistent with the rights
20 provided under this chapter and that is considered an act of fair
21 use under the federal Copyright Act. The license may restrict the
22 holder from using the record for a commercial use only if such use

1 would result in economic harm to the public agency or to the
2 public's interest.

3 6253.11. A public agency shall comply with a request to inspect
4 or copy a public record that is protected by the Copyright Revision
5 Act of 1976 (17 U.S.C. Sec. 101 et seq.) to the extent permitted by
6 this chapter, unless that public record is otherwise exempt from
7 disclosure under any other law, including, but not limited to,
8 Sections 6254 and 6255.

9 SEC. 2. Section 13988 of the Government Code is amended
10 to read:

11 13988. The Legislature finds and declares all of the following:

12 (a) The state is home to many of the world's top research
13 universities, national laboratories, and leading-edge
14 high-technology companies that generate significant intellectual
15 property.

16 (b) It is in the interest of the state to ensure that the results of
17 state-funded research are promptly developed and protected and
18 to make the research available in the public domain, where
19 appropriate.

20 (c) The commercialization of technology developed with the
21 investment of taxpayer dollars in the form of contracts, grants, and
22 agreements could generate public benefit, including, but not limited
23 to, state revenues, favorable pricing, revenue sharing, reinvestment
24 into research, development of new technologies, the
25 commercialization of the product of state-funded research, and the
26 jobs created from these types of research.

27 (d) It is in the interest of the state to facilitate, promote, and
28 enhance technology transfer programs that will facilitate the
29 transfer of technology into the marketplace for the public benefit.

30 (e) The Legislature supports the use of efficient models to
31 develop and streamline infrastructures, policies, and processes for
32 the management of intellectual property developed under state
33 funding in order to stimulate economic development in the state
34 while, at the same time, minimizing costs of administering policies
35 in this area.

36 (f) It is the intent of the Legislature that the rights of state
37 agencies and departments to track and manage intellectual property
38 created with any state funds shall be interpreted so as to promote
39 the benefit to the public and be managed in a way that encourages
40 a release into the public domain whenever it is feasible and

1 appropriate and does not interfere with the public's right to access
2 to public records.

3 ~~(g) It is the intent of the Legislature that the Department of~~
4 ~~General Services have access to information about intellectual~~
5 ~~property created by state employees and by state-funded research,~~
6 ~~consistent with state and federal laws and regulations governing~~
7 ~~access to this information.~~

8 ~~(h) The Legislature recognizes that the licensing of or limitations~~
9 ~~on the use of intellectual property should accommodate free~~
10 ~~expression and, therefore, state agencies and departments should~~
11 ~~not develop policies or procedures to license or otherwise limit~~
12 ~~the use of the state's intellectual property in expressive works~~
13 ~~created by nonstate employees or without state funding.~~

14 ~~(i) The Legislature recognizes that because state agencies and~~
15 ~~departments have different intellectual property needs, a statewide~~
16 ~~and uniform approach to managing the state's intellectual property~~
17 ~~should provide state agencies and departments reasonable levels~~
18 ~~of discretion that promote releasing information into the public~~
19 ~~domain and protect the state from unauthorized economic gain,~~
20 ~~but still ensure the public's right of access to public records.~~

21 ~~SEC. 3. Section 13988.2 of the Government Code is amended~~
22 ~~to read:~~

23 ~~13988.2. (a) The department shall perform all of the following~~
24 ~~functions:~~

25 ~~(1) Commencing January 1, 2015, and every three years~~
26 ~~thereafter, track intellectual property generated by state employees~~
27 ~~or with state funding.~~

28 ~~(2) Develop a database that includes, but is not limited to,~~
29 ~~tracking intellectual property by category of protection, date of~~
30 ~~creation, owner of intellectual property, grantee, state agency or~~
31 ~~granting entity, sources of funding, and status of licensing,~~
32 ~~including invention utilization updates. Failure to include an item~~
33 ~~in the database does not create any presumption regarding~~
34 ~~ownership. Prior to January 1, 2018, the database shall include the~~
35 ~~summary of state-owned intellectual property found in the~~
36 ~~California State Auditor's Report 2011-106 on intellectual property.~~
37 ~~After January 1, 2018, and every three years thereafter, the database~~
38 ~~shall be updated using information collected by the department~~
39 ~~pursuant to this section.~~

1 ~~(3) Develop a sample maintenance plan of an inventory of~~
2 ~~intellectual property.~~

3 ~~(4) Develop factors that state agencies should consider when~~
4 ~~deciding whether to sell their intellectual property, make~~
5 ~~intellectual property available in the public domain, or grant the~~
6 ~~use of their intellectual property to others, including, but not limited~~
7 ~~to, the state's best interest, maintaining public access, and~~
8 ~~preventing improper economic gain through the unauthorized use~~
9 ~~of state-owned intellectual property.~~

10 ~~(5) Develop an outreach campaign informing state agencies of~~
11 ~~their rights and abilities concerning intellectual property created~~
12 ~~by their employees.~~

13 ~~(6) Develop sample invention assignment agreements that state~~
14 ~~agencies can consider if they believe it is necessary to secure the~~
15 ~~rights to potentially patentable items created by their employees~~
16 ~~on worktime using state resources.~~

17 ~~(7) Develop sample language for licenses or terms-of-use~~
18 ~~agreements that state agencies can use to limit the use of their~~
19 ~~intellectual property by others to only appropriate purposes.~~

20 ~~(8) Develop sample language for an advisory provision stating~~
21 ~~that a waiver of the state's intellectual property rights is subject~~
22 ~~to the approval of the department and that the lack of that approval~~
23 ~~renders an attempted waiver void.~~

24 ~~(b) This section shall not apply to the use of expressive works~~
25 ~~created by nonstate employees or without state funding.~~

26 ~~SEC. 4. Section 13988.3 of the Government Code is amended~~
27 ~~to read:~~

28 ~~13988.3. (a) To the extent not inconsistent with the rights of~~
29 ~~the public to obtain, inspect, copy, publish, and otherwise~~
30 ~~communicate information under the California Public Records Act~~
31 ~~(Chapter 3.5 (commencing with Section 6250) of Division 7 of~~
32 ~~Title 1), under subdivision (a) of Section 2 and subdivision (b) of~~
33 ~~Section 3 of Article I of the California Constitution, and under the~~
34 ~~First Amendment to the United States Constitution, a state entity~~
35 ~~may own, license, and, if it deems it appropriate, formally register~~
36 ~~intellectual property it creates or otherwise acquires.~~

37 ~~(b) (1) When a state entity creates a work that is otherwise~~
38 ~~subject to copyright protection, the work shall be released into the~~
39 ~~public domain unless the state entity reasonably determines any~~
40 ~~of the following:~~

1 ~~(A) The work has commercial value, and the release would~~
2 ~~jeopardize the integrity of the work.~~

3 ~~(B) The release would infringe upon the property interests of a~~
4 ~~third party.~~

5 ~~(C) The release would detrimentally affect the state's interests~~
6 ~~in its trademarks, service marks, patents, or trade secrets.~~

7 ~~(2) If a state entity reasonably determines that a work meets the~~
8 ~~criteria described in paragraph (1), the entity shall catalog those~~
9 ~~works and submit the information to the department for the purpose~~
10 ~~of tracking intellectual property generated by state employees or~~
11 ~~with state funding as provided in Section 13998.2.~~

12 ~~(e) Notwithstanding any other law, state agencies and~~
13 ~~departments may, upon request, share records and information~~
14 ~~related to intellectual property generated by state employees or~~
15 ~~with state funding with the department.~~

16 ~~(d) Any employee or former employee of the department who~~
17 ~~has access to or knowledge of the records and information~~
18 ~~described in subdivision (b), shall not divulge or make known to~~
19 ~~any person not employed by the department in any manner not~~
20 ~~expressly permitted by law any particulars of these records or~~
21 ~~information that is restricted by law from public disclosure, or~~
22 ~~represents a first publication of research results, or information~~
23 ~~pertaining to patent rights that would not otherwise be publicly~~
24 ~~available.~~

25 ~~(e) Nothing in this section requires a state entity to own, license,~~
26 ~~or formally register intellectual property that it creates or otherwise~~
27 ~~acquires.~~

28 ~~(f) This section shall not apply to the use of expressive works~~
29 ~~created by nonstate employees or without state funding.~~

30 ~~SEC. 5. Section 13988.35 is added to the Government Code,~~
31 ~~immediately following Section 13988.3, to read:~~

32 ~~13988.35. In the event that a state entity pursues an action for~~
33 ~~copyright infringement, all of the following shall apply:~~

34 ~~(a) Prior to sending a takedown notification, a state entity shall~~
35 ~~reasonably consider in good faith whether the allegedly infringing~~
36 ~~material constituted fair use.~~

37 ~~(b) No state entity shall elect to receive statutory damages as~~
38 ~~provided under the federal Copyright Act of 1976 (17 U.S.C. Sec.~~
39 ~~504(e)) except in cases of willful infringement where there is no~~
40 ~~evidence of fair use.~~

~~(e) Upon a court's finding that the party defending the infringement action engaged in fair use, the state shall waive statutory damages.~~

~~SEC. 6.~~

SEC. 2. Section 14615.1 of the Government Code is amended to read:

14615.1. (a) Where the Legislature directs or authorizes the department to maintain, develop, or prescribe processes, procedures, or policies in connection with the administration of its duties under this chapter and Chapter 2 (commencing with Section 14650) of this part, Chapter 2 (commencing with Section 13988) of Part 4.5, or Section 6611 of the Public Contract Code or Part 2 (commencing with Section 10100) of Division 2 of the Public Contract Code, the action by the department shall be exempt from the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500)). This section shall apply to actions taken by the department with respect to the State Administrative Manual and the State Contracting Manual.

(b) To the extent permitted by the United States and California Constitutions, subdivision (a) also applies to actions taken by the department prior to January 1, 1999, with respect to competitive procurement in the State Administrative Manual and the State Contracting Manual.

~~SEC. 7.~~

SEC. 3. Section 10335 of the Public Contract Code is amended to read:

10335. (a) This article shall apply to all contracts, including amendments, entered into by any state agency for services to be rendered to the state, whether or not the services involve the furnishing or use of equipment, materials, or supplies or are performed by an independent contractor. Except as provided in Sections 10295.6 and 10351, and paragraphs (8) and (9) of subdivision (b) of Section 10340, all contracts subject to this article are of no effect unless and until approved by the department. Each contract shall be transmitted with all papers, estimates, and recommendations concerning it to the department and, if approved by the department, shall be effective from the date of approval. This article shall apply to any state agency that by general or

1 specific statute is expressly or impliedly authorized to enter into
2 the transactions referred to in this section. This article shall not
3 apply to contracts for the construction, alteration, improvement,
4 repair, or maintenance of real or personal property, contracts for
5 services subject to Chapter 10 (commencing with Section 4525)
6 of Division 5 of Title 1 of the Government Code, to contracts that
7 are listed as exceptions in Section 10295, contracts of less than
8 five thousand dollars (\$5,000) in amount, contracts of less than
9 five thousand dollars (\$5,000) where only per diem or travel
10 expenses, or a combination thereof, are to be paid, contracts
11 between state agencies, or contracts between a state agency and
12 local agency or federal agency.

13 (b) In exercising its authority under this article with respect to
14 contracts for the services of legal counsel, other than the Attorney
15 General, entered into by any state agency that is subject to Section
16 11042 or Section 11043 of the Government Code, the department,
17 as a condition of approval of the contract, shall require the state
18 agency to demonstrate that the consent of the Attorney General to
19 the employment of the other counsel has been granted pursuant to
20 Section 11040 of the Government Code. This consent shall not be
21 construed in a manner that would authorize the Attorney General
22 to establish a separate program for reviewing and approving
23 contracts in the place of, or in addition to, the program administered
24 by the department pursuant to this article.

25 (c) Until January 1, 2001, the department shall maintain a list
26 of contracts approved pursuant to subdivision (b). This list shall
27 be filed quarterly with the Senate Committee on Budget and Fiscal
28 Review and the Assembly Committee on Budget. The list shall be
29 limited to contracts with a consideration in excess of twenty
30 thousand dollars (\$20,000) during the life of the contract and shall
31 include sufficient information to identify the provider of legal
32 services, the length of each contract, applicable hourly rates, and
33 the need for the services. The department shall add a contract that
34 meets these conditions to the list within 10 days after approval. A
35 copy of the list shall be made available to any requester. The
36 department may charge a fee to cover the cost of supplying the list
37 as provided in Section 6253 of the Government Code.

38 (d) (1) In exercising its authority under this article, a state
39 agency shall consider the processes, procedures, or policies
40 developed by the department pursuant to Chapter 2 (commencing

1 with Section 13988) of Part 4.5 of Division 3 of Title 2 of the
2 Government Code.

3 (2) For contracts *under this article* entered into on or after
4 January 1, 2017, a state agency shall ~~not enter into a contract under~~
5 ~~this article that fails to address the issue of~~ *consider the* intellectual
6 property rights *of both the state and the contracting party* unless
7 the state agency, prior to execution of the contract, obtains the
8 consent of the department.

9 (e) Contracts subject to the approval of the department shall
10 also have the department's approval for a modification or
11 amendment thereto, with the following exceptions:

12 (1) An amendment to a contract that only extends the original
13 time for completion of performance for a period of one year or
14 less is exempt. If the original contract was subject to approval by
15 the department, one fully executed copy including transmittal
16 document, explaining the reason for the extension, shall be sent
17 to the legal office of the department. A contract may only be
18 amended once under this exemption.

19 (2) Contracts let or awarded on the basis of a law requiring
20 competitive bidding may be modified or amended only if the
21 contract so provides or if authorized by the law requiring
22 competitive bidding.

23 (3) If an amendment to a contract has the effect of giving the
24 contract as amended an increase in monetary amount, or an
25 agreement by the state to indemnify or save harmless any person,
26 the amendment shall be approved by the department.

27 ~~SEC. 8. The Legislature finds and declares that Section 1 of~~
28 ~~this act, which adds Section 6253.11 to the Government Code,~~
29 ~~imposes a limitation on the public's right of access to the meetings~~
30 ~~of public bodies and the writings of public officials and agencies~~
31 ~~within the meaning of Section 3 of Article I of the California~~
32 ~~Constitution. Pursuant to that constitutional provision, the~~
33 ~~Legislature makes the following findings to demonstrate the interest~~
34 ~~to be protected and the need for protecting that interest:~~

35 ~~In order to protect intellectual property developed by state entities~~
36 ~~from copyright infringement, it is necessary to provide a limited~~
37 ~~exemption for these records from the provision of the California~~
38 ~~Public Records Act.~~